



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 14, 2003

Ms. Carol Longoria
Public Information Coordinator
University of Texas System
201 West 7th Street
Austin, Texas 78701-2981

OR2003-7316

Dear Ms. Longoria:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 189476.

The University of Texas at Tyler (the "university") received a written request for the winning proposals for two RFPs issued by the university. You do not contend that the requested information is excepted from required public disclosure. However, you have notified the interested third parties in this matter of their right to submit arguments to this office as to why any portion of the requested proposals should not be disclosed. *See Gov't Code § 552.305* (allowing governmental bodies to rely on third parties having privacy or property interest in information to submit arguments as to why requested information should be withheld from public).

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See Gov't Code § 552.305(d)(2)(B)*. This office has timely received arguments from representatives of Visionality and Media Management that certain information contained in their respective proposals is excepted from required public disclosure.

Initially we note that information is not confidential under the Public Information Act (the "Act") simply because the party submitting the information anticipates or requests that it be

(Tex. 1976). In other words, a governmental body cannot, through a contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987). Consequently, unless the requested information falls within an exception to disclosure, it must be released, notwithstanding any agreement between the university and any third party specifying otherwise.

Media Management specifically contends that portions of its proposal are excepted from required public disclosure pursuant to section 552.110 of the Government Code. Additionally, we infer from Visionality's brief that Visionality also seek to withhold portions of its proposal pursuant to section 552.110. Section 552.110 protects both "trade secret" information and "commercial or financial" information. See Gov't Code § 552.110(a), (b). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. See *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), cert. denied, 358 U.S. 898 (1958); see also Open Records Decision No. 552 at 2 (1990). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.¹ See *id.* This office has held that we must accept a person's claim for exception as valid under the trade secret branch of section 552.110 if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. See Open Records Decision No. 552 at 5-6 (1990). The commercial or financial branch of section 552.110 requires the business enterprise whose information is at issue to make a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure of the information at issue. See Open Records Decision No. 661 (1999); see also *National Parks and Conservation Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974); Open Records Decision No. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure).

After reviewing the proposals and the third party briefs received by this office, we conclude that both Media Management and Visionality have demonstrated the applicability of section 552.110 to specific portions of their respective proposals. We have marked the proposals accordingly. However, neither Media Management nor Visionality has demonstrated how the pricing information contained in their respective proposals is a trade

¹ The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: "(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." RESTATEMENT OF TORTS § 757 cmt. b (1939); see also Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

secret or commercial or financial information the release of which would cause them substantial competitive harm. *See* Open Records Decision Nos. 509 at 5 (1988) (stating that because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative), 319 (1982) (finding information relating to pricing not excepted under section 552.110 and that pricing proposals are entitled to protection under section 552.104 only during bid submission process), 184 (1978); *cf.* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors). Consequently, the submitted pricing information, as well as all of the remaining information contained in the proposals, must be released to the requestor, with the following possible exception.

One of the submitted documents that must be released contain an individual's social security number that may be excepted from required public disclosure under section 552.101 of the Government Code in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if the social security number was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). It is not apparent to us that the social security number contained in the records at issue was obtained or is maintained by the university pursuant to any provision of law enacted on or after October 1, 1990. You have cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes the university to obtain or maintain a social security number. Therefore, we have no basis for concluding that the social security number at issue was obtained or is maintained pursuant to such a statute and is, therefore, confidential under section 405(c)(2)(C)(viii)(I). We caution, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing the social security number, the university should ensure that this number was not obtained or maintained by the university pursuant to any provision of law enacted on or after October 1, 1990.

We additionally note that both of the submitted proposals contain information that is protected by copyright. The copyright law gives the copyright holder the exclusive right to reproduce his work, subject to another person's right to make fair use of it. 17 U.S.C. §§ 106, 107. A governmental body must allow *inspection* of copyrighted materials unless an exception to required public disclosure applies to the information. Attorney General Opinion JM-672 (1987) at 2-3. Also, the requestor may make copies of copyrighted materials unassisted by the state. Attorney General Opinion MW-307 (1981). "Of course, one so doing assumes the risk of a copyright infringement suit." *Id.* at 2. Thus, the university may allow the requestor to view the copyrighted materials, and may also allow him to reproduce the material without the university's assistance so long as such reproduction would not unreasonably disrupt the university's working conditions. *See* Attorney General Opinion JM-757 (1987). It will be the requestor's responsibility to adhere to the federal copyright law.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Jennifer E. Berry
Assistant Attorney General
Open Records Division

JEB/RWP/seg

Ref: ID# 189476

Enc: Submitted documents

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